SUPREME COURT U. S.

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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS

UNITED STATES OF AMERICA, PETITIONER

v.

LEWIS WARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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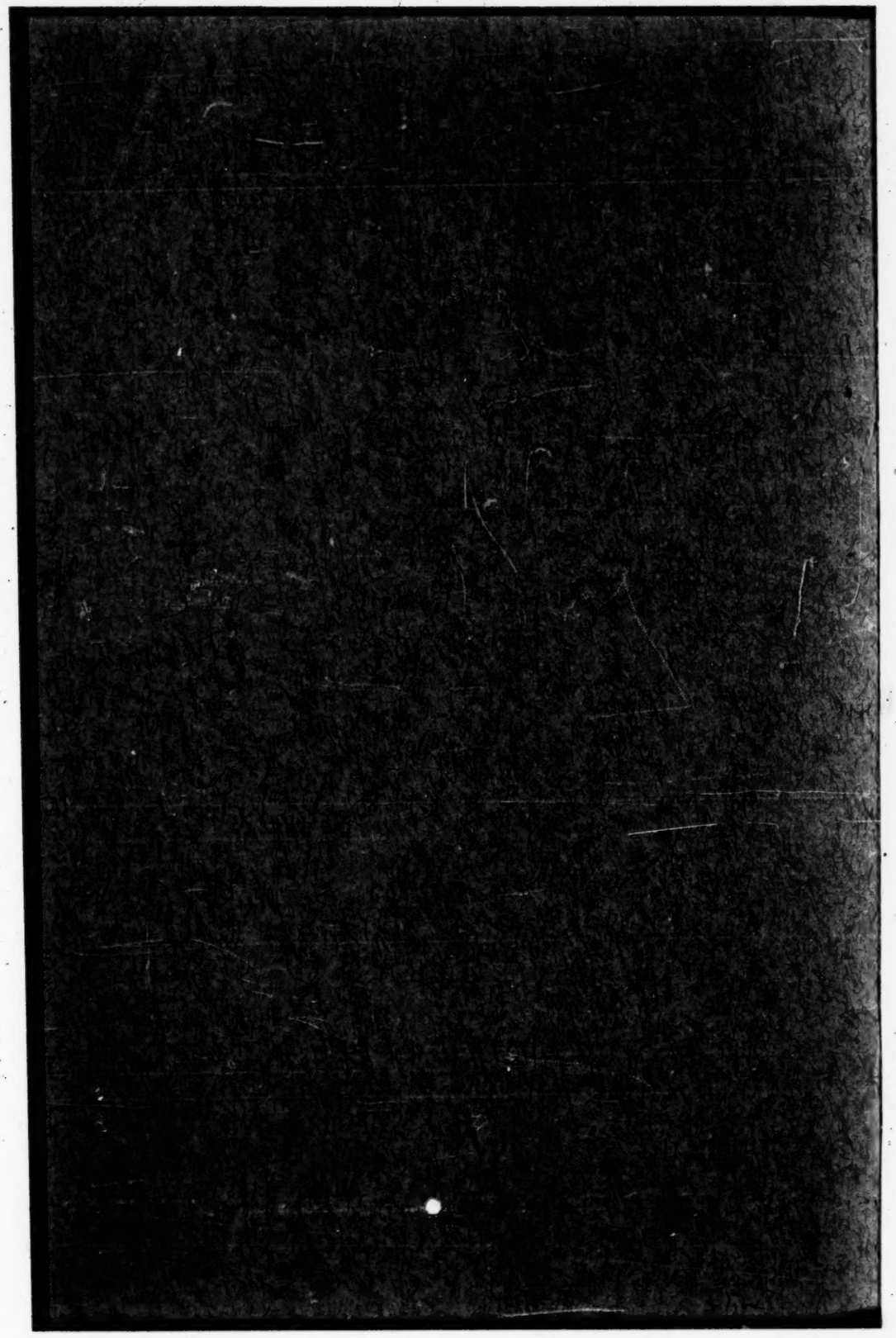

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LEWIS WARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Seventh Circuit, entered on August 19, 1969, in the above cases.

OPINIONS BELOW

The opinions of the court of appeals (Appendix, *infra*, pp. 13–23, 25–27) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on August 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether persons charged with violating 26 U.S.C. 4742(a) can assert the privilege against self-incrimination as a defense to such a prosecution.

2. Whether this Court's decisions in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, should be given retroactive effect.

STATUTES INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744(a) provides:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

The government here seeks review of the decisions of the Seventh Circuit in two cases treated separately by that court but involving the identical question.[1] In each case the respondent was convicted of violations of 26 U.S.C. 4742(a) and 4744(a)(1), involving the unlawful trafficking in marihuana. Both convictions had become final prior to May 19, 1969, the date when this Court decided, in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, that one charged with violating Section 4744(a) could assert the privilege against self-incrimination as a complete defense to a prosecution under that section. Neither respondent had invoked the Fifth Amendment privilege before his conviction had become final. See *United States* v. *Santos*, 385 F. 2d 43 (C.A. 7), certiorari denied, 390 U.S. 954; *United States* v. *Ward*, 369 F. 2d 909 (C.A. 7).

Previous to its decisions in *Leary* and *Covington*, this Court had held, on January 29, 1968—in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85—that since the statutory schemes involved in those cases (taxation of wagers and firearms) required an individual whose activities were regulated by those statutes to file documents with the government containing information incriminating under State or other federal laws, such an individual could properly assert the privilege against self-incrimination as a complete defense to charges arising from a

[1] Rule 23(5) of the Rules of this Court authorizes the filing of a single certiorari petition in such circumstances.

failure to file the required forms. Thereafter, respondents in the present cases filed their separate motions to vacate pursuant to 28 U.S.C. 2255, alleging that the rationale of *Marchetti-Grosso-Haynes* was equally applicable to the marihuana taxing scheme, and that they had not waived their constitutional privilege by failing to raise that defense either at trial or on direct appeal. They requested a reversal of all counts. The sentencing court denied relief. While respondents' appeals were pending in the Seventh Circuit, this Court, on May 19, 1969, decided the *Leary* and *Covington* cases.

On August 19, 1969, the court of appeals reversed the sentencing court in both of the cases of which review is here sought. It held that *Leary* required the reversal of respondents' convictions under Section 4744(a), and 4742(a) as well, since "the order form mandate of § 4742(a) compels the criminal transferor to require the transferee to obtain an order form and to identify him not only as a transferor of marihuana but as a transferor who has not registered and paid the occupational tax required by §§ 4751–4753" (*Santos*, *infra*, p. 18). The court recognized that the Second Circuit had reached a contrary conclusion as to the effect of the privilege upon Section 4742(a) in *United States* v. *Buie*, 407 F. 2d 905, certiorari granted *sub nom. Buie* v. *United States*, 395 U.S. 976.[2] It declined, however, to follow the reasoning of the Second Circuit. Turning to the question of retrospective application, the Seventh Circuit decided that

[2] *Buie* is presently *sub judice*, as No. 271, this Term, having been argued on October 15, 1969.

such an application was appropriate, relying primarily upon the reasoning of the Fourth Circuit in a case in which that court had applied *Haynes* retroactively (*United States* v. *Miller*, 406 F. 2d 1100). Finally, the Seventh Circuit agreed with respondents' claim that they had not waived their Fifth Amendment privilege by failing to assert it before their convictions had become final.

REASONS FOR GRANTING THE WRIT

1. As indicated previously, the decision below is in direct conflict with the holding of the Second Circuit in the *Buie* case. Moreover, in reversing respondents' convictions on counts charging violations of Section 4742(a), the Seventh Circuit has decided an issue presently under consideration by this Court, upon review of the court of appeals' decision in *Buie*. That question, in substance, is whether a *transferor* of marihuana can properly invoke the privilege against self-incrimination as a complete defense to a charge of violating the Marihuana Tax Act's requirement that transactions in marihuana are lawful only if done pursuant to a written order form which the *transferee* must secure. If, contrary to the Seventh Circuit, this Court decides the issue in *Buie* favorably to the government, reversal of the decision below would be required, and a grant of certiorari would be necessary to effect such a disposition.

If, on the other hand, the Court sustains the petitioner's position in *Buie*, and thereby agrees with the Seventh Circuit, the questions whether this ruling should be applied retroactively and whether the privilege had been waived would be clearly presented in

the instant case, and would warrant a grant of certiorari so as to dispose of these troublesome but important matters. In this context, our opposition to retroactive application of such a rule would be founded upon identical considerations which lead us to oppose retroactive application of *Leary* and *Covington*. Accordingly, the ensuing discussion applies equally to convictions under Section 4744(a) (*Leary* and *Covington*) and Section 4742(a) (*Buie*, if resolved adversely to the government), both of which are involved here.

2. Squarely presented in this petition is the issue whether the *Leary* and *Covington* decisions are to be given retroactive application to defendants who had not asserted the Fifth Amendment privilege at trial. In our view, such an assertion, made for the first time years after trial, cannot meaningfully be viewed as timely. Had the privilege been asserted at the proper time, the government would have been put to the choice of insisting on the position it was then taking that the privilege did not furnish a defense or of turning respondents and the evidence against them over to the State for prosecution under State laws directly forbidding possession of marihuana. Respondents should properly be held to the consequences which flow from the fact that the defense of self-incrimination was not timely raised.

At all events, it is our contention that *Leary* and *Covington* should be given prospective application only, and that the conflicting conclusions reached in the lower courts, not only with regard to the retroactivity of *Leary* and *Covington*, but *Marchetti*,

Grosso, and *Haynes* as well, call for specific guidance from this Court. In addition to the Seventh Circuit, the Eighth Circuit has given retroactive effect to *Leary* and *Covington* in a case identical to this one, in that it involves both Sections 4744(a) and 4744(a) (*Rowell* v. *United States*, No. 19,588, decided July 23, 1969).[3] And, prior to the decisions in *Leary* and *Covington*, a district court in the Fifth Circuit considered a collateral attack upon a conviction under Section 4744(a) founded upon an assertion that *Marchetti*, *Grosso*, and *Haynes* should be applied retroactively and construed so as to encompass the marihuana statute. That contention was rejected, however, and a motion to appeal *in forma pauperis* was denied by the court of appeals, *United States* v. *Miller* (C.A. 5), decided November 25, 1969, certiorari denied, No. 106 Misc., this Term (October 13, 1969). See also *Williams* v. *United States*, 291 F. Supp. 376 (D. Minn.).[4] As to the wagering tax cases, see *United*

[3] Contrariwise, a district court in the same circuit has denied retroactive application of those decisions (*Borrett* v. *United States*, 300 F. Supp. 1060 (D. Minn.)).

[4] And see *Sepulveda* v. *United States*, No. 232–68 (C.A. 10), decided August 11, 1969, holding that a defendant convicted in 1960 for the second time of violating the marihuana laws and still serving the sentence imposed when that conviction would be denied relief since his reliance now, for the first time, upon the privilege against self-incrimination, both as to that conviction and the earlier one in 1954, was not timely. The Tenth Circuit noted that it had not considered the retroactivity question because it was unnecessary to do so in that case. It is our view that, whether or not a defendant had raised the privilege at trial, he should be given no relief if his conviction had become final before May 19, 1969. Otherwise, each collateral challenge would require a hearing to determine whether there had been an intelligent waiver of the privilege.

States v. *Lucia*, 6 Crim. L. Rep. 2021 (C.A. 5), decided September 17, 1969, and *Graham* v. *United States*, 407 F. 2d 1313 (C.A. 6), pending on petition for a writ of certiorari, No. 294 Misc., this Term, reaching opposite results. See also, *Mackey* v. *United States*, 411 F. 2d 504 (C.A. 7). As to convictions under the firearms statute, see *United States* v. *Miller*, 406 F. 2d 1100 (C.A. 4), according retroactive application to *Haynes*, while several district courts have rejected retroactivity in this context (*Stoney* v. *United States*, 302 F. Supp. 145 (E.D. Mo.); *Horton* v. *United States*, 300 F. Supp. 1332 (D. Conn.); *Wainwright* v. *United States*, 289 F. Supp. 820 (E.D. Tenn.)). The Sixth Circuit is presently considering this issue in *Decker* v. *United States*, No. 19,846.

Our argument that *Leary* and *Covington* should be given prospective application necessarily starts with the recognition that "the Constitution neither prohibits nor requires retrospective effect" (*Linkletter* v. *Walker*, 381 U.S. 618, 629), and a consideration of the criteria established by this Court for determining retroactivity, last enunciated in *Halliday* v. *United States*, 394 U.S. 831, 832. Those criteria are (1) the purpose of the newly fashioned rule; (2) the extent of reliance upon the prior rule; and (3) the effect that retroactive application would have upon the administration of justice. See also *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States*, 394 U.S. 244, 249. It does not demean the importance of the privilege against self-incrimination to observe that its purpose does not relate alone to protecting

the innocent from conviction, but more importantly "to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'" (*Tehan* v. *Shott*, 382 U.S. 406, 415). In sharp contrast to constitutional rules which have been given retroactive application because they touched closely upon the truth-determining process or involved safeguards against infecting a criminal proceeding with the clear danger of convicting the innocent (*e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *Jackson* v. *Denno*, 378 U.S. 368; *Gideon* v. *Wainwright*, 372 U.S. 335), the Fifth Amendment privilege stands as a protection of quite different values—"values reflecting the concern of our society for the right of each individual to be let alone" (*Tehan* v. *Shott*, *supra*, 382 U.S. at 416). While these latter values are indeed important, from the standpoint of determining retroactivity they do not furnish a basis for other than prospective application of constitutional decisions in that area, particularly in a situation where, as here, there was no likelihood whatsoever that the accused were innocent of their crimes, but were motivated not to comply with federal order form and tax requirements merely by the threat of what else might have been revealed by compliance.

The second criterion, the extent to which law enforcement authorities have relied upon the old standard, must take into account the fact that prior to *Leary* and *Covington* two circuits which handle a large volume of cases involving the marihuana tax laws had, on several recent occasions, rejected the conten-

tion successfully urged in *Leary* and *Covington*, and had been implicitly upheld in this regard by this Court. *E.g.*, *Browning* v. *United States*, 366 F. 2d 420 (C.A. 9); *Rule* v. *United States*, 362 F. 2d 215 (C.A. 5), certiorari denied, 385 U.S. 1018; *Haynes* v. *United States*, 339 F. 2d 30 (C.A. 5), certiorari denied, 380 U.S. 924; *Palmer* v. *United States*, 332 F. 2d 788 (C.A. 9). Indeed, as recently as the date on which the Court granted certiorari in *Marchetti* (January 9, 1967), it declined to hear a challenge of the Marihuana Tax Act on Fifth Amendment grounds in the *Rule* case. There can be little doubt, therefore, that law enforcement authorities were justified in believing that there was no constitutional violation in denying an accused transferee of marihuana the right to defend himself against a charge of violating Section 4744(a) through assertion of his privilege against self-incrimination.

The third criterion, the effect of retroactive application of the new standard upon the administration of justice, also militates against applying *Leary* and *Covington* retroactively. Substantial numbers of defendants are serving sentences imposed by courts throughout the nation as a result of pre-*Leary* and pre-*Covington* convictions for violating Section 4744(a). Numerous collateral attacks similar to the ones made by respondents have occurred since May 19, 1969, the date those cases were decided. In the Southern District of Texas alone, 44 such applications for relief were filed between May 19 and October 31, 1969. At this time 26 have been denied or withdrawn, and the remainder are still pending. Retroactive ap-

plication of *Leary* and *Covington* would require consideration of the timeliness of each such claim, and in instances where the accused had not asserted the privilege at trial, a hearing to determine whether there had been an intelligent waiver. The error complained of is not so fundamental that it should be allowed at this time to disrupt seriously the administration of our criminal laws and require the upsetting of all final convictions based upon it.

3. At all events, the question of the retroactivity of *Leary* and *Covington* is one of substantial importance in the administration of criminal justice in the federal judicial system. It is plainly an issue of recurring significance which warrants resolution by this Court. Should the Court not accept the government's position on the merits in *Buie*, the instant case provides an appropriate vehicle for this Court's consideration of that issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1969.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1968—APRIL SESSION, 1969

No. 16985

EFRAIN SANTOS, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

AUGUST 19, 1969

Before MAJOR and HASTINGS, Senior Circuit Judges and CUMMINGS, Circuit Judge.

HASTINGS, *Senior Circuit Judge.* Efrain Santos appeals from the district court's denial of his motion, filed pursuant to 28 U.S.C.A. § 2255, for collateral relief from a judgment of conviction entered by that court following a jury trial.

The record before us establishes that appellant was charged in five counts of a six-count indictment with violating federal marihuana and conspiracy statutes. Two of such counts charged a conspiracy while the other three charged substantive offenses. On November 15, 1966, appellant was found guilty by a jury verdict and was convicted of violating 26 U.S.C.A. §§ 4742(a), 4744(a)(1) and 18 U.S.C.A. § 371. His conviction was affirmed by this court on November 13,

1967, in *United States* v. *Santos*, 7 Cir., 385 F. 2d 43 (1967), *cert. denied*, 390 U.S. 954.

Seeking collateral relief from his conviction, appellant claimed that he was deprived of the effective assistance of counsel at the trial level[1] and that the marihuana statutes under which he was convicted contravene the Fifth Amendment privilege against self-incrimination.[2]

In denying appellant's § 2255 petition for relief on May 15, 1968, the trial court, with deference to then existing precedent, did not find the challenged marihuana statutes unconstitutional and stated that if such laws should be held unconstitutional "* * * it should be done by the Supreme and Appellate Courts which have previously upheld the statutes against constitutional attacks." The reasoning espoused in the recent Supreme Court decisions of *Leary* v. *United States*, 395 U.S. 6 (May 19, 1969), and *United States* v. *Covington*, 395 U.S. 57 (May 19, 1969), compels us to reverse the trial court's order in dismissing appellant's § 2255 petition for relief.

The privilege against self-incrimination as guaranteed by the Fifth Amendment provides a full defense to the substantive counts charged against Santos. Further, the conspiracy counts must fall with the underlying substantive counts. See *Grosso* v. *United States*, 390 U.S. 62, 70 (1968).

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[1] In view of our disposition of this case, we do not deem it necessary to reach the question of whether appellant was denied effective assistance of counsel.

[2] Insofar as relevant the Fifth Amendment provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

It appears clear that *Leary* requires a reversal of Santos' conviction under § 4744(a)(1).[3] In *Leary*, the Supreme Court reversed the petitioner's conviction under 26 U.S.C.A. § 4744(a)(2) holding that the "petitioner's invocation of the privilege [against self-incrimination]' was proper and * * * should have provided a full defense" to the count alleging a violation of § 4744(a)(2). The necessary implication of *Leary* is that the substantive violations under § 4744(a)(1) in the instant case can not be sustained. No reasonable grounds exist for distinguishing between a conviction premised on § 4744(a)(1) and a conviction obtained under § 4744(a)(2). Both provisions of § 4744 share identical constitutional infirmities and are equally subject to the privilege against self-incrimination, as guaranteed by the Fifth Amendment. These provisions of § 4744, when viewed within the context of the comprehensive statutory scheme of the Marihuana Tax Act,[4] expose

[3] Insofar as relevant, 26 U.S.C.A. § 4744(a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

"(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

"(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained."

[4] In *Leary*, *supra* at 14–15, the Supreme Court aptly summarizes the statutory scheme of the Marihuana Tax Act:

"The Marijuana Tax Act has two main subparts: The first imposes a tax on transfers of marijuana, the second an occupational tax upon those who deal in the drug. It is convenient to begin with the occupational tax provisions, 26 U.S.C. §§ 4751–4753.

"Section 4751 provides that all persons who 'deal in' marijuana shall be subject to an annual occupational tax. Subsections require that specified categories of persons, such as im-

a person to a "real and appreciable" risk of self-incrimination, within the rationale of *Leary* v. *United States, supra*; *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968).

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porters, producers, physicians, researchers, and millers pay varying rates of tax per year. See §§ 4751(1)–(4), (6). Persons who 'deal in' marijuana but do not fall into any of the specified categories are required to pay $3 per year. See § 4751(5). Section 4753 provides that at the time of paying the tax the taxpayer must 'register his name or style and his place or places of business' at the nearest district office of the Internal Revenue Service.

"The first of the transfer tax provisions, 26 U.S.C. § 4741, imposes a tax 'upon all transfers of marijuana which are required by § 4742 to be carried out pursuant to written order forms.' Section 4741 further provides that on transfers to persons registered under § 4753 the tax is $1 per ounce, while on transfers to persons not so registered the tax is $100 per ounce. The tax is required to be paid by the transferee 'at the time of securing each order form.' With certain exceptions not here relevant, § 4742 makes it unlawful for any person, 'whether or not required to pay a special tax and register under sections 4751 to 4753,' to transfer marijuana except pursuant to a written order form to be obtained by the transferee. A regulation, 26 CFR § 152.69, provides that the order form must show the name and address of the transferor and transferee; their § 4753 registration numbers, if they are registered; and the quantity of marijuana transferred. Another regulation, 26 CFR § 152.66, requires the transferee to submit an application containing these data in order to obtain the form. Section 4742(d) of the Act requires the Internal Revenue Service to 'preserve' in its records a duplicate copy of each order form which it issues.

"Another statutory provision, 26 U.S.C. § 4773, assures that the information contained in the order form will be available to law enforcement officials. That section provides that the duplicate order forms required to be kept by the Internal Revenue Serv-

We are also of the view that the Fifth Amendment privilege against self-incrimination may be invoked as a defense to a charge premised upon § 4742(a)[5] and find that Santos' conviction under this section must fall under the weight of *Leary* and the related cases of *Marchetti* v. *United States, supra*, *Grosso* v. *United States, supra*, and *Haynes* v. *United States, supra*. As noted in *Leary*, "§ 4742 makes it unlawful for any person, 'whether or not required to pay a special tax and register under sections 4751 to 4753,' to transfer marijuana except pursuant to a written order form to be obtained from the transferee." Thus, before a legal transfer of marihuana can be made, the transferor is statutorily obliged, under pain

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ice shall be open to inspection by Treasury personnel and state and local officials charged with enforcement of marijuana laws, and that upon payment of a fee such officials shall be furnished copies of the forms.

"Finally, 26 U.S.C. § 4744(a) makes it unlawful for a transferee required to pay the § 4741(a) transfer tax either to acquire marijuana without having paid the tax or to transport, conceal, or facilitate the transportation or concealment of, any marijuana so acquired."

[5] Insofar as relevant, 26 U.S.C.A. § 4742 provides:

"(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary [of the Treasury] or his delegate.

* * * * *

"(c) * * * whenever any such forms are sold, the Secretary or his delegate shall cause the date of sale, *the name and address of the proposed vendor*, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same." (Emphasis added.)

of criminal prosecution, to have the transferee obtain the required order form. To secure the order form, the transferee, pursuant to § 4742, *supra*, must disclose the name and address of the proposed transferor.

When considered in conjunction with other interrelated sections of the Marihuana Tax Act, the net legal effect of § 4742(a) is to place the criminal transferor in the position of being statutorily *required* to provide the government with information "which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt." *Marchetti v. United States*, *supra* at 48. This is true since the order form mandate of § 4742(a) compels the criminal transferor to require the transferee to obtain an order form and to identify him not only as a transferor of marihuana but as a transferor who has not registered and paid the occupational tax required by §§ 4751–4753. This interplay of the sections exposes the criminal transferor to a real hazard of self-incrimination since such information becomes readily available to investigate authorities.

We see no legally significant reason for distinguishing between the *Marchetti* type statutory scheme, in which the defendant is required to personally incriminate himself, and the more subtle statutory scheme, as is found in the instant case, where the law requires the defendant to compel another to divulge equally incriminating information. Both statutory schemes confront the defendant with a real and substantial risk of incrimination. The privilege against self-incrimination provides a complete defense to prosecution for failure to comply with either incriminating scheme. There is a "right not to be criminally liable for one's previous failure to obey a statute

which required an incriminatory act." *Leary* v. *United States*, *supra* at 28.

In the recent case of *United States* v. *Baie*, 2 Cir., 407 F. 2d 905 (1969), the Second Circuit was faced with resolving the identical issue of whether the Fifth Amendment privilege against self-incrimination can be invoked by a defendant-transferor as a defense to a conviction for transferring marihuana without the written order form required by § 4742(a). On the authority of its decision in *United States* v. *Minor*, 2 Cir., 398 F. 2d 511 (1968),* the *Baie* court affirmed the defendant-transferor's conviction and concluded that under the statutory scheme of the Marihuana Tax Act the defendant did not *personally* reveal his own identity and thereby incriminate himself. In substance, the court held that "the privilege against self-incrimination is personal" and is not violated so long as the defendant-transferor does not have to personally provide the incriminatory information.

We respectfully disagree with the holding in *Baie* and feel that the *Minor* decision is not apposite to the resolution of this issue.

While it is manifestly clear that the interplay of § 4742(a) and 4742(c) results in the transferee providing the incriminatory information about the defendant-transferor, it is equally certain that statutory interplay compels the defendant to cause the transferee to reveal such information. The protective boundaries of the privilege are not so narrow as to fail to encompass the situation where one is compelled, under threat of criminal prosecution, to have another incriminate him.

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*The Supreme Court recently granted certiorari in *United States* v. *Minor*, 37 U.S.L.W. 3458 (June 2, 1969).

In determining whether an individual is entitled to the shelter of the Fifth Amendment privilege, we feel that the spirit and philosophy of the privilege against self-incrimination require us to focus our attention on the question of whether the person seeking the insulation of the shelter is compelled, either personally or through another, to provide self-incriminating information. To hold that the shelter of the privilege is contingent solely upon the question of who actually provided the incriminatory material unnecessarily restricts the boundaries of the privilege and thwarts its purpose.

With deference, in our judgment, the *Minor* holding is distinguishable from and is not dispositive of the issue presented by the instant case and that in *Buie*. *Minor* involved the question of whether the privilege against self-incrimination affords a defense to a conviction for selling narcotic drugs (heroin) without the mandatory written order form required by § 4705(a) of the correlative Narcotic Drugs Tax Act. Section 4705(a) makes it unlawful for any person to transfer narcotic drugs except pursuant to a written order form which is to be obtained by the transferee from the appropriate governmental authorities. In affirming the defendant-transferor's § 4705(a) conviction, the *Minor* court held that the defendant's "compliance with § 4705(a) would not have subjected him to the risk of self-incrimination" because the transferor "of narcotic drugs is not required to register *or in any other way to incriminate himself in order to comply fully with the requirements of § 4705(a)*." (Emphasis added.) *United States v. Minor*, *supra* at 514–515. Herein, in our judgment, rests the critical distinction between *Minor* and *Buie*.

As shown, § 4742(a) does have the effect of forcing the defendant-transferor to risk the hazards of self-

incrimination since to comply with the section, the transferor is required to have the transferee obtain the prescribed order form and thereby disclose his identity. Compliance with § 4705(a) does not entail the same risk because under the statutory scheme of the Narcotic Drugs Tax Act the transferee is able to obtain the required order form without revealing the identity of the defendant-transferor. See *Lawler* v. *United States*, 7 Cir., —— F. 2d —— (1969).

On the authority of *Grosso* v. *United States, supra* at 70–72, we are constrained to hold that the appellant did not knowingly waive his constitutional privilege against self-incrimination by failing to raise this defense at trial or upon appeal. It would be anomalous and contravene the precepts of fairness to hold otherwise for at the time of the appellant's trial and appeal the decisions in *Leary*, *Marchetti*, *Grosso* and *Haynes* had not been handed down. It is axiomatic that "unless the defendant is fully aware of a constitutional right, he cannot effectively waive it." *United States* v. *Roseuson*, D.C.E.D. La., 291 F. Supp. 874, 877 (1968). See also *Fay* v. *Noia*, 372 U.S. 391, 439–440 (1963), *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *United States ex rel. O'Connor* v. *State of New Jersey*, 3 Cir., 405 F. 2d 632, 634 (1969). Under the circumstances of the instant case, there is no reason to believe Santos knowingly waived a constitutional right which evolved subsequent to his trial and appeal.[7] Defendants should not be required to antici-

[7] The *Leary* opinion also requires that the constitutional question be raised in timely fashion. By timeliness, we understand the Court to be referring to the doctrine that an issue must first be presented to the district court before it can be argued on appeal. In the present case, in view of the fact that *Marchetti* and its companion cases as well as *Leary* were decided after petitioner's conviction became final on appeal, we

pate favorable Supreme Court rulings "or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of * * * [a favorable forthcoming] decision." *United States* v. *Manfredonia*, 2 Cir., 391 F. 2d 229, 230 (1968).

Our holding is premised upon the reasoning of the foregoing Supreme Court decisions which were handed down after the appellant's conviction became final. Obviously, our decision in this matter assumes that these recent cases should be given retroactive effect. While we are fully aware of the present conflict in the circuits with respect to the resolution of the issue of retroactivity,[1] we are persuaded by the reasoning and the result reached in *United States* v. *Miller*, 4 Cir., 406 F. 2d 1160 (1969). The import of the Fourth Circuit holding is that these cases are entitled to retroactive application under the guidelines set forth in *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

In sum, we conclude that the Supreme Court in *Leary* changed the ground rules and held that the Fifth Amendment privilege against self-incrimination bars a conviction of an unregistered transporter of marihuana who could not comply with the requirements of 26 U.S.C.A. §§ 4741 et seq., without incriminating himself.[2] The learned district court did not have the

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are of the opinion that the presentation of these unwaived constitutional questions to the district court in the petition to vacate and set aside the conviction was timely and that the issues are now properly before us for decision.

[1] In the case of *Graham* v. *United States*, 6 Cir., No. 18725, March 10, 1969, the Sixth Circuit in a per curiam opinion held that *Marchetti* and *Grosso* were not to be applied retroactively to a conviction which became final prior to the date of these decisions.

[2] For a careful analysis of *Leary* and *Covington* see 38 U.S.L.W. 3052–53 (July 29, 1969).

benefit of *Leary* in dismissing appellant's petition for relief under § 2255, Title 28, U.S.C.A.

Having concluded that appellant could not be held to have waived his constitutional right to assert his privilege against self-incrimination and that *Leary* should be given retroactive application to bar his conviction, we are left with no alternative but to reverse and remand with directions.

Accordingly, the judgment of the district court denying appellant's § 2255 petition for relief is reversed, and this cause is remanded to the district court with directions to grant the relief sought in said petition and for any other action required not inconsistent with this opinion.

REVERSED AND REMANDED.

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM, 1968—APRIL SESSION, 1969

No. 16955

LEWIS WARD, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

August 19, 1969

Before MAJOR and HASTINGS, Senior Circuit Judges, and CUMMINGS, Circuit Judge.

PER CURIAM. Lewis Ward, appeals from the district court's denial of his motion, filed pursuant to 28 U.S.C.A. § 2255, for collateral relief from a criminal judgment of conviction entered by that court following a jury trial.

The record reveals that appellant Ward was charged in a two-count indictment with violating federal marihuana statutes. Count one of the indictment charged appellant with violation of 26 U.S.C.A. § 4744(a)(1). Count two of the indictment charged appellant with violation of 26 U.S.C.A. § 4742(a). Following pleas of not guilty, appellant was found guilty on both counts by a jury verdict. Appellant was sentenced to concurrent twelve-year terms on each count. His conviction was affirmed by this court in *United States* v.

Ward, 7 Cir., 360 F. 2d 209 (1966) and the denial of a subsequently filed petition for collateral relief was affirmed by this court in *Ward* v. *United States*, 7 Cir., 387 F. 2d 843 (1967).

In appellant's present § 2255 petition, he contends that his conviction violates his constitutional privilege against self-incrimination, as guaranteed by the Fifth Amendment. In substance, appellant argues that the statutory provisions upon which his conviction is premised, when considered in conjunction with other interrelated sections of the Marihuana Tax Act, are inconsistent with the limitations imposed by the Fifth Amendment privilege against self-incrimination.

In the companion case of *Santos* v. *United States*, Slip Opinion No. 16985, August 19, 1969, this court was faced with the identical issue of whether the privilege against self-incrimination provides a complete defense to convictions obtained for failure to comply with such statutory provisions.

On the basis of the reasoning set forth in the *Santos* opinion, we find that compliance with these provisions has the legal effect of exposing one to a real and appreciable risk of self-incrimination. Under the rationale of the recent Supreme Court decisions in *Leary* v. *United States*, 395 U.S. 6 (1969), *United States* v. *Covington*, 395 U.S. 57 (1969), *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosso* v. *United States*, 390 U.S. 62 (1968), *Haynes* v. *United States*, 390 U.S. 85 (1968) and our decision today in *Santos* v. *United States*, *supra*, we are compelled to hold that the privilege against self-incrimination provides a complete defense to the appellant's convictions.

On the authority of our holding this date in the companion case of *Santos* v. *United States*, *supra*, the

judgment of the district court denying appellant's § 2255 petition is reversed, and this cause is remanded to the district court with directions to grant the relief sought in said petition and for any other action required not inconsistent with this opinion.

REVERSED AND REMANDED.